ORIGINAL

88-6009

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No. 88 -

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

EDDIE A. CRAWFORD,

Petitioner,

- v. -

STATE OF GEORGIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

GARY A. ALEXION

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ATTORNEY FOR PETITIONER

QUESTION PRESENTED

Whether the decision below, denying a change in venue in a death penalty case because a fair trial was not "impossible," violates due process; and, if so, what are the minimal due process requirements for state change of venue standards in capital cases.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional and Statutory Provisions

Other Authorities

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Petitioner, Eddie A. Crawford, respectfully prays that a writ of certiorari issue to review the judgment and decision of the Supreme Court of the State of Georgia entered on the 19th day of November 1987, which affirmed petitioner's death sentence.

OPINION BELOW

The opinion of the Supreme Court of the State of Georgia is reported as Crawford v. State, 257 Ga. 681, 362 S.E. 2d 201 (1987), and is annexed hereto as Appendix A.

JURISDICTION

The judgment and order of the Supreme Court of Georgia were entered on November 19, 1987. A timely filed petition for rehearing was denied on December 16, 1987. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1257(3), petitioner asserting a deprivation of his rights secured by the United States Constitution.

TIMELINESS OF FILING

Petitioner is an indigent inmate under sentence of death. He was represented at trial and in the court below by an attorney retained by members of his family. Petitioner last spoke with this attorney, Mr. August F. Siemon, III, of Atlanta, Georgia, before the case was decided by the Supreme Court of the State of Georgia on November 19, 1987. Mr. Siemon never advised petitioner that he would not continue to represent him after the final decision of the Supreme Court of the State of Georgia.

On or about October 1, 1988, the Georgia Appellate Practice and Educational Resource Center, with which undersigned counsel is associated, commenced operations. This organization was founded by the State Bar of Georgia to ensure that all inmates under sentence of death in Georgia are represented by counsel in post-conviction proceedings.

In early October 1988, the personnel of the Georgia Appellate Practice and Educational Resource Center, including undersigned counsel, became aware of petitioner's case and of the fact that petitioner seemed to have no current counsel. On October 14, 1988, undersigned counsel visited petitioner at his place of confinement, the Georgia Diagnostic and Classification Center in Jackson, Georgia. At that time petitioner indicated that he wanted the instant petition filed on his behalf and that he wanted undersigned counsel to represent him. Thereafter, undersigned counsel communicated with Mr. Siemon and, on October 21, 1988, received the trial record, transcript and other relevant documents.

From December 16, 1987 through October 14, 1988, petitioner was effectively without counsel. Moreover, during this period petitioner was unaware of the fact that his previous attorney was not continuing to represent him.

Although this petition is filed after the expiration of the time prescribed in Rule 20.1, petitioner respectfully requests, for the reasons set forth above, that this Court waive the time requirements in the interests of justice.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the eighth amendment to the United States Constitution, which provides that:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted;

and the fourteenth amendment to the United States Constitution which provides in relevant part:

> [N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Course of Proceedings

Petitioner was indicted for murder in the death of Leslie Michelle English, which occurred on September 25, 1983. He was convicted of murder on March 7, 1984 and sentenced to death on March 8, 1984. On May 31, 1985, the Supreme Court of Georgia reversed the conviction and sentence on the ground that the guilty verdict did not specify whether the jury had found defendant guilty of malice murder or felony murder and that under the then existing indictment a conviction of felony murder could not stand. Crawford v. State, 254 Ga. 435, 330 S.E. 2d 567 (1985).

Petitioner was thereafter indicted for felony murder, for the same alleged acts, and convicted of that offense on February 5, 1987. He was sentenced to death on February 6, 1987.

The Supreme Court of Georgia affirmed the conviction and sentence on direct appeal on November 19, 1987. Crawford v. State, 257 Ga. 681, 362 S.E. 2d 201 (1987).

B. Facts Relevant to the Question Presented

Petitioner's retrial commenced on January 26, 1987. At voir dire, it quickly became apparent that a substantial number of the potential jurors knew that there had been a previous trial. Many of these knew either that the petitioner had been found guilty or that he had received a death sentence, or both.

In anticipation of this, petitioner's trial counsel had filed a motion for change of venue, which was denied by the court at trial. T. 1126.[1]

Additionally, during voir dire, petitioner's trial counsel objected to the seating of any juror who had knowledge of the prior proceeding. This too was denied. T. 230-31.

An examination of the transcript of the voir dire reveals the true extent to which the venire was tainted by the knowledge of the prior trial. Of a panel of 90 potential jurors, 78 were asked specifically whether they were aware of any prior proceedings in petitioner's case. Of these, 57 (74%) indicated that they knew about the prior trial. Of the 78, 50 (64%) indicated that they knew that a previous jury had adjudged the petitioner guilty; 32 of them (41%) indicated that they knew that the prior jury had determined that a death sentence was appropriate.

Of the 78 jurors who were asked about the previous trial, 29 were excused for cause. Arguably, it is the remaining group of 49 which should be scrutinized to determine the extent of the taint. Performing the calculations with respect to this smaller pool, however, indicates no significant diminishment of the taint: 33 of them (67%) knew of the prior trial; 29 (59%) knew of the prior adjudication of guilt; and 19 (39%) knew of the prior imposition of a death sentence.[2]

Counsel for petitioner used all of his peremptory challenges in selecting the jury. Nonetheless, a substantial number of the jurors who heard and decided the case knew about the prior proceedings in some way: eight knew about the prior trial; five

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[1] Numerals preceded by "T." refer to the transcript of trial, held January 26 through February 6, 1987.

[2] During the voir dire, petitioner's counsel was forced into a delicate situation in questioning jurors who did not know about the prior proceeding. On the one hand, he did not want to taint the minds of the jurors who did not know about the prior trial, so he avoided asking these members of the venire what their reaction would be if and when they found out about it. At the same time, he was concerned that if a jury was chosen that consisted partly of persons who knew and partly of persons who did not, discussions amongst them would give rise to a taint which would not thereafter be discoverable. T. 230-31.

also knew about the prior adjudication of guilt and three knew that the prior jury had set the punishment of death. In fact, the jury foreman, who knew about the trial and adjudication of guilt, was selected after petitioner's counsel had exhausted his peremptory challenges.

On direct appeal, petitioner contended, inter alia, that the trial court erred in not granting the motion for a change of venue. This argument was rejected by the Supreme Court of Georgia on the grounds that the petitioner had not shown during voir dire that a fair trial was "impossible." Crawford v. State, 257 Ga. 681, 683, 362 S.E.2d 201, 203 (1987).

REASON FOR GRANTING THE WRIT

I. THE GEORGIA RULE PRECLUDING A CHANGE OF VENUE IN A DEATH PENALTY CASE UNLESS A FAIR TRIAL IS "IMPOSSIBLE" VIOLATES DUE PROCESS AND THIS COURT SHOULD ESTABLISH MINIMAL DUE PROCESS REQUIREMENTS FOR STATE CHANGE OF VENUE STANDARDS IN CAPITAL CASES.

This Court has long recognized that "[a] fair trial in a fair tribunal is a basic requirement of due process." In re Murchison, 349 U.S. 133, 133 (1955). To comport with this due process requirement, a jury trial must be before "a panel of impartial, 'indifferent' jurors." Irvin v. Dowd, 366 U.S. 717, 722 (1961). Thus, a refusal to change the venue of a trial where the accused has demonstrated even potential jury predisposition against him can violate the due process clause of the fourteenth amendment to the United States Constitution. See, e.g., Rideau v. Louisiana, 373 U.S. 723 (1963); Sheppard v. Maxwell, 384 U.S. 333 (1966).

Petitioner here showed that a vast proportion of the venire knew of his prior trial and prior death sentence for the same crime. Nevertheless, the Georgia Supreme Court denied petitioner's motion for a change of venue on the grounds that petitioner's evidence did not establish actual jury prejudice "to a degree that rendered a fair trial impossible." Crawford v. State, 257 Ga. 681, 683, 363 S.E.2d 201, 203 (1987) (emphasis added). The Georgia standard -- allowing for a change of venue only where an accused can show that a fair trial is "impossible" -- is only one of numerous standards enunciated by state courts around the country. This Court should grant the writ to establish clear constitutional limits on state change of venue standards in light of the "vacuum of constitutional precedent" in this important area. Brecheen v. Oklahoma, 108 S.Ct. 1085, 1086 (1988) (Marshall, J., dissenting from denial of certiorari).

A. Lack of a Clear Standard in this Court's Cases

This court has rendered numerous decisions involving changes of venue due to jury predisposition. See, e.g., Patton v. Yount, 467 U.S. 1025 (1984); Dobbert v. Florida, 432 U.S. 282 (1977); Murphy v. Florida, 421 U.S. 794 (1975); Sheppard v. Maxwell, 384 U.S. 333 (1966); Rideau v. Louisiana, 373 U.S. 723 (1963); Irvin v. Dowd, 366 U.S. 717 (1961). But in each of these cases, the

Court has examined only whether changes of venue are constitutionally mandated in the factual circumstances of specific trials. See id.; Brecheen v. Oklahoma, 108 S.Ct. at 1086 (Marshall, J., dissenting from denial of certiorari). The Court has "had little occasion to apply these basic principles to determine whether particular state standards for change of venue comport with the requirements of due process." Id. at 1086.

On one occasion, this Court did find that a state statute regulating venue changes violated due process. In Groppi v. Wisconsin, 400 U.S. 505 (1971), the Court struck down a Wisconsin rule denying changes of venue in all misdemeanor cases. Aside from this, however, states have been afforded no guidance in developing standards for changes of venue which ensure that due process is not violated.

B. The State Standards

As a result of the "vacuum of constitutional precedent" on due process requirements for state change of venue standards, states have adopted a wide variety of change of venue rules. Brecheen v. Oklahoma, 108 S.Ct. at 1086 (Marshall, J., dissenting from denial of certiorari). In some states, venue must be changed whenever "there is a reasonable likelihood that in the absence of such relief, a fair trial cannot be had." Martinez v. Superior Court, 29 Cal.3d 574, 577-78, 174 Cal. Rptr. 701, 702, 629 P.2d 502, 503 (1981); accord State v. Cuevas, 288 N.W.2d 525 (Iowa 1980); Waukazo v. State, 269 N.W.2d 373 (Minn. 1978). The Martinez court interprets the phrase "reasonable likelihood" as "denot[ing] a lesser standard of proof than 'more probable than not.'" Martinez, 29 Cal.3d at 578, 174 Cal. Rptr. at 702, 629 P.2d at 503.

Other states will grant venue changes only if there are "reasonable grounds to believe that the prejudice alleged actually exists" and a "reasonable apprehension" that the prejudice would prevent a fair trial. People v. Gendron, 41 Ill.2d 351, 243 N.E.2d 208, 211 (1968); accord State v. Pease, 740 P.2d 659 (Mont. 1987). This standard is higher than the "reasonable likelihood" rule. State v. Link, 640 P.2d 366, 368 (Mont. 1981). At least one state

has adopted a standard requiring a "realistic likelihood of prejudice." State v. Biegenwald, 106 N.J. 13, 33, 524 A.2d 130, 140 (1987).

Still other states require a "substantial likelihood" that a fair trial cannot be had before a motion for change of venue must be granted. See, e.g., Commonwealth v. Cohen, 489 Pa. 167, 178, 413 A.2d 1066, 1072, cert. denied, 449 U.S. 840 (1980). The ABA endorses the "substantial likelihood" rule in its Standards Relating to Fair Trial and Free Press 8-3.3(c) (2d ed. Approved Draft, 1978).

In Georgia, however, a motion for a change of venue based upon actual juror predispositions will not be granted unless the accused can show "prejudice to a degree that rendered a fair trial impossible." Chancey v. State, 256 Ga. 415, 430, 349 S.E.2d 717, 730 (1986); Street v. State, 237 Ga. 307, 311, 227 S.E.2d 750, 754 (1976).[3]

The Supreme Court of Georgia affirmed the denial of petitioner's motion for a change of venue because he did not meet this stringent test. Crawford v. State, 257 Ga. 681, 683, 362 S.E.2d 201, 203 (1987).

The Georgia standard is higher even than the Oklahoma threshold for change of venue condemned in Brecheen v. Oklahoma, 108 S.Ct. 1085 (Marshall, J., dissenting from denial of certiorari). In Oklahoma, venue will not be changed unless the accused presents "'clear and convincing evidence' that a fair trial is a 'virtual impossibility'". Id. at 1086 (emphasis added). Justice Marshall, joined by Justice Brennan, found that Oklahoma's venue change standard "fail[ed] to accommodate properly the concerns expressed in [this Court's] due process precedents." Id. at 1087.

The conflict and confusion among the states about the proper standard for venue changes is evidenced by shifts in state

[3]Georgia has explicitly refused to adopt the lesser "reasonable likelihood" standard, even when that rule was endorsed in the ABA Standards Relating to Fair Trial and Free Press. Mooney v. State, 243 Ga. 373, 386, 254 S.E.2d 337, 347 (1979).

standards. Montana, which had required a showing of "prejudice substantial enough to make a fair trial impossible," switched abruptly in 1981 to a rule requiring only "reasonable grounds to believe that the prejudice alleged actually exists" and a "reasonable apprehension" that the prejudice would prevent a fair trial. State v. Link, 640 P.2d 366, 368 (Mont. 1981). In New Jersey, the standard changed from a requirement of "clear and convincing proof that a fair and impartial trial cannot be had" to allowing venue changes "where it is 'necessary to overcome the realistic likelihood of prejudice.'" State v. Biegenwald, 106 N.J. 13, 33, 524 A.2d 130, 139-40 (1987), citing State v. Williams, 93 N.J. 39, 67-68 n.13, 459 A.2d 641, 656 n.13 (1983). Even the ABA has changed its recommended standard from the "reasonable likelihood" rule to the "substantial likelihood" rule. Compare, ABA Standards Relating to Fair Trial and Free Press 3.2(c) (1968) with ABA Standards Relating to Fair Trial and Free Press 8-3.3(c) (1978).

C. The Need for Resolution of the Issue

The strict Georgia venue change standard -- denying changes in venue unless prejudice has rendered a fair trial "impossible" -- violates all precepts of due process. This Court has enunciated various thresholds for examining questions of due process, none of which even approaches the strict "impossibility" standard adopted in Georgia. For example, the Court has repeatedly recognized that "our system of law has always endeavored to prevent even the probability of unfairness." In re Murchison, 349 U.S. 133, 136 (1955) (emphasis added); see also Sheppard v. Maxwell, 384 U.S. 333, 352 (1966); Estes v. Texas, 381 U.S. 532, 544-45 (1965). The Court has also stated that "[e]very procedure which would offer a possible temptation to the average man . . . to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law." Tumey v. Ohio, 273 U.S. 510, 532 (1927) (emphasis added); see also Irvin v. Dowd, 366 U.S. 717, 722 (1961); Estes v. Texas, 381 U.S. at 543.

Petitioner here clearly established the likelihood that the jury in his case would not "hold the balance nice, clear and true between the State and the accused." Almost 75% of the venire who were asked knew that he had been tried before for the same crime. Of those asked about the verdict and sentence in the previous trial, 64% knew that petitioner had been found guilty and 41% knew that he had been sentenced to death. Yet because he could not show that this vast knowledge among the venire made a fair trial "impossible," petitioner was denied a change of venue under Georgia law.

D. The Need for Resolution of the Issue in Death Penalty Cases

That petitioner may have been tried by a jury with "such fixed opinions that they could not judge impartially," Patton v. Yount, 467 U.S. 1025, 1035 (1984), is even more troubling given that this is a death penalty case. This Court has long recognized, under the eighth amendment to the United States Constitution, a heightened need for reliability in cases involving the death penalty. Woodson v. North Carolina, 428 U.S. 280, 305 (1978). "When a defendant's life is at stake the Court has been particularly sensitive to insure that every safeguard is observed." Gregg v. Georgia, 428 U.S. 153, 187 (1976).

Moreover, in death penalty cases the jury undertakes a unique role in the sentencing phase: to "express the conscience of the community on the ultimate question of life or death." Witherspoon v. Illinois, 391 U.S. 510, 519 (1968). In no other area of jurisprudence does the jury make such a momentous decision. For this reason, the Court has recognized the need for special procedural safeguards to avoid the "unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner." Booth v. Maryland, 482 U.S. ___, 107 S.Ct. 2529, 2533 (1987); see also Gregg v. Georgia, 428 U.S. 153, 189 (1976). In petitioner's case, jurors knew of his previous trial and prior death sentence for the same crime. That knowledge created an "unacceptable risk" that for the crucial life-or-death decision in the sentencing phase of his trial, petitioner did not have the

"panel of impartial, 'indifferent' jurors" guaranteed by the due process clause of the United States Constitution. Irvin v. Dowd, 366 U.S. 717, 722 (1961).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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ATTORNEY FOR PETITIONER

No. 88-

IN THE SUPREME COURT OF THE UNITED STATES

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EDDIE ALBERT CRAWFORD

Petitioner,

-v-

STATE OF GEORGIA,

Respondent.

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Petition for Writ of Certiorari to the Supreme Court of Georgia upon Respondent by hand, addressed as follows:

Eddie Snelling, Jr. Esq.
Senior Assistant Attorney General
132 State Judicial Building
40 Capitol Square, S.W.
Atlanta, Georgia 30334

This the 30th day of November, 1988.

ATTORNEY FOR PETITIONER

APPENDIX "A"

I think the argument that the magistrate had no reason to suspect that the officer was telling him an untruth to obtain the warrant somehow makes it alright, is ridiculous. Are we now extending the "good faith" rule to magistrates when they are told an untruth so as to "cure" the officer's untruthful statement? I pray not.

257 Ga. 681
CRAWFORD
v.
The STATE.
No. 44563.

Supreme Court of Georgia.

Nov. 19, 1987.

Reconsideration Denied Dec. 16, 1987.

Defendant was convicted in the Superior Court, Spalding County, Ben J. Miller, J., of murder, and he appealed. The Supreme Court, 254 Ga. 435, 330 S.E.2d 567, reversed and remanded. On remand, defendant was again convicted of murder and sentenced to death. Defendant appealed. The Supreme Court, Hunt, J., held that: (1) hair and fiber comparisons and eyewitness testimony regarding defendant's threats against victim's mother and presence in victim's bedroom on night of murder, sufficiently established that defendant was perpetrator of crime; (2) prospective jurors' knowledge of guilty verdict entered in prior trial of case did not entitle defendant to change of venue; (3) defendant was not entitled to additional continuance, to gather evidence in support of motion for expert assistance; and (4) death sentence imposed in felony-murder case arising out of defendant's kidnapping, rape and disfigurement of 29-month-old girl was not excessive or disproportionate or result of passion, prejudice, or other arbitrary factor.

Affirmed.

1. Homicide ⇐234(12)

Hair and fiber comparisons placing victim in defendant's car, and eyewitness testimony regarding defendant's threats against victim's mother and presence in victim's bedroom on night of murder, sufficiently established beyond any reasonable doubt that defendant was perpetrator of crime.

2. Criminal Law ⇐126(2)

Prospective jurors' knowledge of guilty verdict entered in prior trial of case did not entitle defendant to change of venue, where murder case received relatively little publicity or retrial, and vast majority of prospective jurors indicated that they had no fixed opinions on case and could render impartial verdict.

3. Criminal Law ⇐1166.16

Denial of murder defendant's request for additional voir dire after one prospective juror testified to prejudicial remarks made by another was not reversible error, where defendant was afforded opportunity to strike both jurors for cause and to inquire of other jurors whether they had heard remarks.

4. Criminal Law ⇐614(1)

Indigent defendant was not entitled to additional continuance to gather evidence in support of motion for expert assistance where date for hearing on motion had been set several weeks in advance and had already been once continued at defendant's request.

5. Criminal Law ⇐1166(7)

Any error resulting from trial court's denial of defendant's request for additional continuance to gather evidence in support of motion for expert assistance was harmless beyond reasonable doubt, where trial court authorized "initial" grant of $1,000 which defendant could spend as he saw fit.

6. Criminal Law ⇐1031(1)

Indigent defendant could not complain that public funds awarded by trial court to procure expert assistance were either inadequate or came too late, where defendant failed to provide trial court with names of

any potential expert witnesses or to estimate likely cost of such assistance at hearing on motion for assistance.

7. Homicide ⇐354

Death sentence imposed in felony-murder case arising out of defendant's kidnapping, rape and disfigurement of 29-month old girl was not excessive or disproportionate or result of passion, prejudice, or other arbitrary factor. O.C.G.A. § 17-10-35(c)(3).

August F. Siemon III, Atlanta, for Eddie Crawford.

Johnnie L. Caldwell, Jr., Dist. Atty., J. David Fowler, Asst. Dist. Atty., Thomaston, Michael J. Bowers, Atty. Gen., Eddie Snelling, Jr., Asst. Atty. Gen., for state.

HUNT, Justice.

Including one interlocutory appeal, this death penalty case is here for the third time. In its original appearance, we reversed the conviction because of the possibility that Crawford was convicted of felony murder—a crime not charged in the indictment on which he was originally tried. *Crawford v. State*, 254 Ga. 435(1), 330 S.E. 2d 567 (1985). After remand to the trial court, the defendant filed a motion to enjoin the state from seeking a death sentence a second time. The trial court denied the motion, and on appeal, we affirmed, holding that the state was not prohibited for any reason from "seeking anew the death penalty." *Crawford v. State*, 256 Ga. 57, 58, 344 S.E.2d 215 (1986). The case then proceeded to trial, and the defendant was convicted of murder and sentenced to death.[1]

The facts are set forth in our previous opinion. See *Crawford v. State*, supra, 254 Ga. at 436-37, 330 S.E.2d 567. Stated briefly, the evidence shows that while defendant was recently separated from his wife, he unsuccessfully propositioned his wife's sister, threatened to "get" her, and, later that night, raped and murdered her 29-month-old daughter.

1. As we noted previously, forensic evidence was introduced at the first trial "that several head and pubic hairs consistent with those of the defendant were found on the victim's body[,]" and that "[c]arpet fibers found on the victim's body were consistent with the fibers of the carpet in the defendant's car." 254 Ga. at 437, 330 S.E. 2d 567.

There was also a hair admitted in evidence at the previous trial, which ostensibly was removed in a "vaginal swabbing" of the victim, and which was consistent with hair from the defendant's arm. In the retrial, this particular hair was excluded from evidence because of the state's failure to establish a sufficient chain of custody. Defendant now argues that without this "critical piece of alleged evidence," the state's case is insufficient to establish guilt. We do not agree.

[1] Other hair and fiber comparisons remained in evidence. Moreover, although no one actually saw defendant murder his niece, the circumstances of her disappearance, conjoined with his admissions, strongly establish his guilt. Crawford threatened to "get" the victim's mother the night the victim disappeared. Sometime after 3:00 a.m., Crawford's car was seen by a neighbor outside the victim's home, with its lights on and its engine running, and the victim's grandfather saw Crawford walking through the darkened house into the victim's bedroom. At 5:00 a.m., the victim's mother returned and discovered the victim to be missing. Soon afterwards, Crawford was seen in the area, and, when asked about the victim's whereabouts, replied "Randy [the victim's father] done it." Although he denied any memory of committing rape or murder, Crawford admitted to law enforcement officers that the victim was in his automobile at the critical time, that she would not wake up, and that he exited the car with her in his arms and returned without her. The victim's body was found in a wooded area. She had been sexually assaulted and strangled.

The evidence, viewed in the light most favorable to the jury's determination, supports the conviction for felony murder in the commission of an aggravated assault beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

[2] 2. Defendant argues that his motion for a change of venue should have been granted.

As defendant points out, most of the prospective jurors were aware that defendant had been convicted previously of the crime for which he was now being tried. A lesser, but significant, number of prospective jurors were aware of the prior sentence. Defendant argues that the level of knowledge about the earlier proceedings was sufficient to disqualify this venire, and to require a retrial in some other venue. We do not agree. Comparatively little publicity attended the retrial of the case. Indeed, the trial court observed, "Some of the jurors made mention of a brief news account about the retrial, and that's the only evidence before this court that there has been any recent publicity." The setting of the trial was not "inherently prejudicial as the result of the pretrial publicity[.]" *Chancey v. State*, 256 Ga. 415, 430, 349 S.E.2d 717 (1986).

Nor did the "jury selection process show actual prejudice to a degree that rendered a fair trial impossible." Id at 431, 349 S.E.2d 717. Compare *Coleman v. Kemp*, 778 F.2d 1487 (11th Cir.1985), cert. denied *Kemp v. Coleman*, 476 U.S. 1164, 106 S.Ct. 2289, 90 L.Ed.2d 730 (1986).

Here, 90 prospective jurors were examined on voir dire; of these, 40 were excused for cause. However, less than 30 were disqualified for bias resulting from prior knowledge of the case.[2] "The relevant question is not whether the community remembered the case, but whether the jurors at [this] trial had such fixed opinions that they could not judge impartially the guilt of the defendant [or the sentence that might be imposed]." *Patton v. Yount*, 467 U.S. 1025, 1035, 104 S.Ct. 2885, 2891, 81 L.Ed.2d 847 (1984).

The 50 jurors qualified in this case (to select 12 jurors and two alternates) did not have such fixed opinions. The trial court's finding that defendant could receive a fair trial in Spalding County is supported by the record. We find no error in the denial of the defendant's motion for change of venue.

[3] 3. The voir dire examination was conducted as follows: Each panel of 12 was brought into the courtroom and asked the statutory voir dire questions contained in OCGA § 15-12-164, and some general questions. Then the panel was removed to a jury assembly room, and the members of the panel were brought into the courtroom one at a time to undergo an individual, sequestered examination concerning their knowledge of the case and their attitudes about the death penalty.

Handley, the second prospective juror in the fourth panel, was challenged for cause by the state based on her conscientious objection to the death penalty and her stated preference for life imprisonment as a punishment. This challenge was denied on the ground that the prospective juror had testified that, in an appropriate case, she could impose a death sentence. However, she was subsequently excused for cause on another ground; she had taught the defendant in school, knew his parents, and had often transported the defendant home from ball games, and she felt she could not be an impartial juror.

1. Crawford was convicted of felony murder (on an indictment properly charging that offense) on February 5, 1987. A sentencing hearing was conducted and he was sentenced to death February 6. The case was docketed in this court on April 16, 1987, and, after all parties were given extensions of time to file their briefs, the case was orally argued July 1, 1987.

2. Nine were excused for anti-death-penalty bias, one was excused for medical reasons, one was excused because she had been the defendant's school teacher, and one was excused because he had been summoned for jury duty in the previous trial of this case. Six others were excused, not because they had a fixed opinion of the defendant's guilt, but because they had a fixed opinion that the defendant should be executed if found guilty. Arguably, the pro-death-penalty bias of at least some of these six jurors was a consequence of their prior knowledge of the case.

Later, prospective juror Lane, number seven on this panel, reported that he had "heard one comment [in the jury assembly room] to the effect that he didn't give her a second chance, why is he getting a second chance." Prospective juror Lane testified that this kind of remark "riles me up," and he did not himself "have that attitude," and did not "understand it." He testified that he "probably was the only one that heard it." Lane identified Handley as the person making the remark to no one in particular, while reading a magazine.

The trial court re-summoned Handley, who, as noted above, had been excused, and examined her in chambers, outside the presence of the attorneys. She admitted making the comment, but stated that she was referring to "an article about cocaine, about a child not getting a second chance on cocaine ..." She stated that she "was not referring to Eddie Crawford," pointing out: "If I had said that, I wouldn't be against the death penalty."

Handley identified two other prospective jurors who might have heard the remark, Lane (who had reported it) and Daniel.

The trial court reported its finding to the attorneys. The court noted that, during her voir dire examination, the third juror (Daniel) had been asked whether she had heard any prospective jurors comment on the case and whether she had discussed the case with any prospective juror, and had answered in the negative.

Defendant's attorney made two motions; one, that he be allowed to voir dire former prospective juror Handley again, and, two, that he be allowed to question further all of the qualified prospective jurors that were in that room at the time the remark was made, to determine whether they had heard it and whether it had affected them.

The court did not rule immediately on these motions, but ultimately denied them, as follows:

"First, as to juror number one [Handley] and juror number two [Daniel], I specifically asked juror number two whether or not she had discussed it with any other jurors, and she answered no. I further have satisfied myself, by talking with juror number one, that juror number two is the only person that possibly could have heard it. But in addition to that, I have asked all of the qualified jurors if they have heard any opinions of other[s] or expressed any opinions themselves, and the ones that are qualified all answered that question in the negative. Based upon this, I decline to grant your motion for any further voir dire or interrogation of juror number one and juror number two."

Defendant argues that the trial court's "failure ... to allow adequate voir dire of prospective jurors" concerning a "seriously prejudicial remark" requires the reversal of this case. We disagree.

First, all prospective jurors, before and after the incident, were questioned extensively about their knowledge, if any, of the case, and about what, if anything, they had heard.

Second, after prospective jurors completed their examinations on voir dire, they were excused. Thus, many prospective jurors whose examinations preceded that of juror Lane would not have been in the jury assembly room when juror Handley made her comment. Although it is not clear just when she made the comment, or just who was in the assembly room at the time, it does appear from the record that, of the panel of 12 prospective jurors to which Handley, Lane and Daniel belonged, eight were excused. Only one of the four who qualified was examined before Lane testified.

Third, 48 prospective jurors were examined *after* Lane reported the incident. Defendant was not denied an opportunity to question these prospective jurors as to whether any of them had overheard juror Handley's remark or any other comments made in the jury assembly room, and not a single one was shown to have heard the comment.

Finally, it is clear that prospective juror Handley, who was conscientiously opposed to the death penalty, and who was partial to the defendant, did not intend to express an opinion that the defendant receive a death sentence. Just as clearly, juror Lane

was not prejudiced against the defendant by the remark. Whether or not juror Daniel was prejudiced by the comment, the defendant was afforded an opportunity to strike her for cause. Instead, he renewed his challenge to the poll, which was denied, and exercised a peremptory strike against her.

The remark at issue here did not generate a "significant possibility of prejudice," *Jordan v. Lippman*, 763 F2d 1265, 1275 (11th Cir.1985). In these circumstances, the voir dire examination was not constitutionally inadequate.[3]

4. We find no merit to the defendant's contention that persons between the ages of 18 and 30 are unconstitutionally underrepresented on Spalding County jury lists. See *Hicks v. State*, 256 Ga. 715(7), 352 S.E.2d 762 (1987).

5. The defendant next contends he was deprived of a fair opportunity to receive and utilize funds, denying him due process, equal protection, and a reliable sentencing hearing, citing *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985).

"[T]he general rule is that the grant or denial of a motion for assistance of expert witnesses and other investigative services lies within the sound discretion of the trial court...." *Castell v. State*, 250 Ga. 776, 783(4), 301 S.E.2d 234 (1983). However, abuses of discretion may result in reversal on appeal. *Williams v. Newsome*, 254 Ga. 714, 716, 334 S.E.2d 171 (1985). In an appropriate case, "the due process clause could require the government, both state and federal, to provide ... expert assistance to an indigent defendant upon a sufficient showing of need." *Moore v. Kemp*, 809 F.2d 702, 712 (11th Cir.1987). See *Thornton v. State*, 255 Ga. 434, 339 S.E.2d 240 (1986). The defendant argues the trial court denied him meaningful access to experts by delaying his requested hearing on the issue, refusing to hear evidence on his particular needs, and refusing his requests for a continuance. We disagree.

[4] The defendant was represented in this trial by counsel who was retained by the defendant's family. It is not disputed that the defendant himself is indigent. His counsel filed his notice of appearance in this case on July 31, 1985. A double jeopardy claim was raised and denied, and the denial affirmed on interlocutory appeal to this court. *Crawford v. State*, supra 256 Ga. 57, 344 S.E.2d 215. The trial court received the remittitur from this court on July 12, 1986. On October 17, 1986, the trial court issued an order, scheduling a "First Proceeding" under the Unified Appeal Procedure, 252 Ga. A-13 et seq. for December 8, 1986, for the purpose of disposing of all motions filed by that date. After defense counsel notified the court of a conflict in his schedule, the date scheduled for the first proceeding was postponed to January 12, 1987.

Among the motions pending at that time was the defendant's motion for "necessary funds," which included general requests for an investigator on the ground that the case "presents complex factual evidence which requires the services of a paid investigator," for "scientific experts" because the case "involves scientific evidence which is of a critical nature and that experts in the field disagree as to the reliability of said evidence," for a "community prejudice survey" for funds to demonstrate the invalidity of the grand and traverse jury lists in Spalding County, for funds to investigate an alleged history of discrimination by the prosecutor in the exercise of his peremptory challenges and in exercising his discretion to seek a death sentence, and for the services of a "medical doctor" to present "critical evidence in mitigation of punishment."

3. The trial court did not immediately identify Handley and Daniel to the parties, who did not learn who was involved, besides Lane, until much later in the voir dire proceedings. Moreover, the parties were not furnished a transcript of the court's discussion of the incident with juror Handley until after the appeal was docketed in this court. Although we find no reversible error here, we would observe that had the parties been fully informed of all the relevant circumstances immediately, the defendant's concerns about the incident may well have been alleviated, or even eliminated.

As the first hearing on his motion was to begin, the defendant's attorney stated that, notwithstanding the initial continuance at his request and the date for this hearing had been set several weeks previously, he would be "unprepared" to present any evidence on the motion. He requested a continuance and offered to present evidence that he was involved in two other capital cases which prevented him from adequately preparing his motion for funds. The attorney complained that he "apparently [was] not going to have an opportunity to put on evidence in support of this motion ... I wouldn't get any relief anyway ... and we rely on the motion as filed." Notwithstanding, the trial court granted the defendant $1,000, "initially," to use as he saw fit.

[5] Under these circumstances, the trial court did not err by denying a continuance and proceeding at the time scheduled, over the defendant's objection that it was "impossible for us to meet the timetables that are being set by the court." Furthermore, error, if any, was alleviated by the grant of funds without an evidentiary showing of specific need and without any strings. Thus, we conclude the defendant was not harmed by any alleged denial of an opportunity for a meaningful hearing or by the failure of the trial court to grant a continuance.

[6] Thereafter, on the third day of voir dire, the defendant's attorney informed the court that his "investigator used up the money that the court awarded us, and rather than come back to the court and have an evidentiary hearing and use up even more time trying to get funds, the family came up with some more money, another $1,000 to pay the investigator this week ..." However, after the jury was selected, but prior to opening statements, the question of funds was raised again. This time, the defendant's attorney was given a second opportunity to present his request for funds and to do so ex parte. At that time, he informed the court that he "[felt] fairly comfortable with being able to put up a case in the guilt or innocence phase of the trial ... [T]he investigation is fairly complete ... The problem is in the penalty phase." He requested additional funds for a serologist, a pathologist, and a psychological expert to testify to the defendant's alcoholism and his change in personality since his return from Vietnam, but presented no specific evidence concerning the names or expenses involved in obtaining such witnesses.

As for what the defense attorney's proffer ought to contain, the Eleventh Circuit has summarized the general scope of such a proffer as follows: "[A] defendant must demonstrate something more than a mere possibility of assistance from a requested expert; due process does not require the government automatically to provide indigent defendants with expert assistance upon demand. Rather, ... a defendant must show the trial court that there exists a reasonable probability both that an expert would be of assistance to the defense and that denial of expert assistance would result in a fundamentally unfair trial ... In each instance, the defendant's showing must also include a specific description of the expert or experts desired; without this basic information, the court would be unable to grant the defendant's motion, because the court would not know what type of expert was needed. In addition, the defendant should inform the court why the particular expert is necessary." [Footnotes omitted.] *Moore v. Kemp*, supra, 809 F.2d at 712.

At this hearing, despite the defendant's failure to present the court with any bills showing how the previously granted $1,000 had been spent, and notwithstanding his failure to name any potential expert witnesses or to estimate the likely cost of such assistance, the court awarded the defendant an additional $1,000.

Since the defendant failed to establish his specific entitlement to any funds and did not present the court with any bills showing how the previously granted $1,000 had been spent, he is in no position to contend that the trial court refused to hear evidence on his request for funds, and has failed to demonstrate that the funds the trial court did award were inadequate or came too late.

The defendant has presented no cause for reversal and a new trial.

Sentence Review

[7] 6. The jury found as statutory aggravating circumstances that the offense of murder was committed while the offender was engaged in the commission of two other capital offenses, rape and kidnapping with bodily injury, and that the offense of murder was wantonly vile, horrible or inhuman in that it involved an aggravated battery to the victim. See OCGA § 17-10-30(b)(2) and (b)(7).

The victim's body was discovered in a wooded area, nude from the waist down, and covered with "vegetable debris" and insect (apparently ant) bites. There were minor bruises on her face, and a laceration on the inside of her upper lip. There was an "area of hematoma or hemorrhage and some contusions" at the vaginal opening, and blood had drained outside of the vaginal canal onto her inner thighs. The vaginal canal was torn as the result of "something [being inserted] into the vaginal opening which was larger than it could accommodate."

"A person commits the offense of aggravated battery when he maliciously causes bodily harm to another ... by seriously disfiguring his body or a member thereof." OCGA § 16-5-24(a).

"A person commits the offense of rape when he has carnal knowledge of a female forcibly and against her will. Carnal knowledge in rape occurs when there is any penetration of the female sex organ by the male sex organ." OCGA § 16-6-1(a).

"A person commits the offense of kidnapping when he abducts or steals away any person without lawful authority or warrant and holds such person against his will." OCGA § 16-5-40(a). "[I]f the person kidnapped shall have received bodily injury ...," the defendant has committed the offense of kidnapping with bodily injury, which is a capital felony. OCGA § 16-5-40(b). "A bodily injury includes any injury to the body." *Waters v. State*, 248 Ga. 355, 367(10), 283 S.E.2d 238 (1981).

The evidence in this case supports the jury's finding that the defendant kidnapped and raped the victim, and committed an aggravated battery (the serious disfigurement of her vaginal canal) that was "separate and distinct ... from the act [strangulation] causing death ..." *Davis v. State*, 255 Ga. 588, 593(3c), 340 S.E.2d 862 (1986).

The evidence supports the jury's findings of statutory aggravating circumstances. OCGA § 17-10-35(c)(2).

7. We do not find that the sentence of death was imposed as the result of passion, prejudice, or other arbitrary factor. OCGA § 17-10-35(c)(3).

8. Defendant's death sentence is neither excessive nor disproportionate to penalties imposed in similar cases, considering both the crime and the defendant. OCGA § 17-10-35(c)(3). The similar cases listed in the Appendix support the imposition of a death sentence in this case.

Judgment affirmed.

All the Justices concur.

APPENDIX.

Parker v. State, 256 Ga. 543, 350 S.E.2d 570 (1986); *Devier v. State*, 253 Ga. 604, 323 S.E.2d 150 (1984); *Allen v. State*, 253 Ga. 390, 321 S.E.2d 710 (1984); *Felker v. State*, 252 Ga. 351, 314 S.E.2d 621 (1984); *Brown v. State*, 250 Ga. 66, 295 S.E.2d 727 (1982); *Moser v. State*, 247 Ga. 316, 276 S.E.2d 15 (1981); *Justus v. State*, 247 Ga. 276, 276 S.E.2d 242 (1981); *Green v. State*, 246 Ga. 508, 272 S.E.2d 475 (1980); *Cape v. State*, 246 Ga. 520, 272 S.E.2d 487 (1980); *Thomas v. State*, 245 Ga. 688, 266 S.E.2d 499 (1980); *Gates v. State*, 244 Ga. 587, 261 S.E.2d 349 (1979); *Brooks v. State*, 244 Ga. 574, 261 S.E.2d 379 (1979); *Collins v. State*, 243 Ga. 291, 253 S.E.2d 729 (1979); *Spraggins v. State*, 243 Ga. 73, 252 S.E.2d 620 (1979); *Davis v. State*, 242 Ga. 901, 252 S.E.2d 443 (1979); *Johnson v. State*, 242 Ga. 649, 250 S.E.2d 394 (1978); *Moore v. State*, 240 Ga. 807, 243 S.E.2d 1 (1978);

APPENDIX—Continued

Gibson v. State, 236 Ga. 874, 226 S.E.2d 63 (1976).

257 Ga. 706

MINOR

v.

MINOR et al.

No. 44954.

Supreme Court of Georgia.

Nov. 24, 1987.

Reconsideration Denied Dec. 16, 1987.

Subsequent to extensive litigation concerning administration of an estate, the Superior Court, Taylor County, Kenneth B. Followill, J., found former executor in contempt for failure to comply with previous court orders and sentenced him to county jail until he purged himself by securing signature of his wife and children to certain security deeds conveying estate property. Court also ordered him to pay attorney fees and $197 per day until order was complied with. Executor appealed. The Supreme Court, Gregory, J., held that: (1) contempt order did not improperly require executor to cause others over whom he lacked control to take action; (2) order was one of civil contempt rather than criminal contempt; (3) there was authority for award of attorney fees and no prohibition against that award; and (4) order that executor pay $197 per day until compliance with court's order was proper, since statutory limitation applicable to criminal contempt did not apply.

Affirmed.

1. Contempt ⇐24

Trial court's order holding former executor of estate in contempt for failure to obey prior court orders, and requiring him to deliver up security deeds to secure debt to his wife and children as to certain estate property for cancellation or to produce quitclaim deeds, did not require executor to cause others over whom lacked control to take action and was a proper contempt order, since executor had it within his own power to cause ill effect of deeds on estate to be removed, either by persuading wife and children to voluntarily satisfy deeds or furnish quitclaim deeds, or by paying the alleged underlying debts in order to obtain necessary result, particularly since executor himself had caused the original clouds on title of the estate property.

2. Contempt ⇐68

Any prohibition on attorney fees in contempt actions is limited to criminal contempt actions, if such prohibition exists at all, based on constitutional and statutory limits put on power of courts to punish for criminal contempt. Const. Art. 1, § 2, Par. 4; O.C.G.A. § 15-6-8.

3. Contempt ⇐20

Contempt action brought against former executor of estate, holding executor in contempt for failure to obey prior court order and requiring him to deliver up certain security deeds to estate property, was an order in civil contempt rather than in criminal contempt, since sanctions imposed were not to punish for past misconduct but to compel future actions.

4. Contempt ⇐68

There was no prohibition against award of attorney fees upon finding of former executor of estate to be in civil contempt for failure to obey previous court orders in connection with estate property, and there was statutory authority for trial court's award of attorney fees against executor; such award in contempt order was therefore proper. Const. Art. 1, § 2, Par. 4; O.C.G.A. §§ 9-15-14, 15-6-8.

5. Contempt ⇐75

Statutory limitation imposed on criminal contempt sanctions did not apply, and trial court was authorized to require former executor of estate to pay $197 per day until he complied with court order, in finding of civil contempt against executor for